STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
CIVIL DIVISION, BRANCH 18

GRANT E. STORMS,

Plaintiff,
v.

Case No. 04 CV 002205
Case Code: 30106

ACTION WISCONSIN, INC. and
CHRISTOPHER OTT,

Defendants.

DEFENDANTS' REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR COSTS AND FEES

I. THE PLAINTIFF CONCEDES THAT THE TIME SPENT ON THIS CASE BY DEFENDANTS' COUNSEL AND THEIR HOURLY RATES ARE REASONABLE.

In support of their motion for fees and costs, Defendants submitted detailed affidavits describing precisely what work was done by their attorneys, the hourly rates associated with that work and the costs of the case. Defendants also submitted affidavits from attorneys who practice in Milwaukee and elsewhere in Wisconsin verifying that the services performed and the hourly rates for those services were reasonable.

The Plaintiff did not respond to those submissions. He produced neither affidavits nor other evidence that the services performed by counsel for the Defendants, their hourly rates or costs expended were unnecessary or unreasonable. Nor did the Plaintiff argue in his brief that the claimed fees and costs were in any way unreasonable.

Consequently, the Plaintiff has conceded that $78,542.50 in attorney fees and $2,095.33 in statutory costs are reasonable. This is because arguments not refuted are deemed admitted. *See, Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493, 499 (Ct. App. 1979). Should the Court conclude the lawsuit filed by Attorney Donohoo and continued by him was frivolous, the Court should enter a judgment for those amounts plus the time and costs associated with (1) the review of Plaintiff's Response Brief on this matter, (2) the preparation of this Reply Brief, (3) the review of Plaintiff's Motion for Reconsideration, and (4) the review of and reply to correspondence generated by Plaintiff's counsel since August 11, 2005. The Affidavit of Lester A. Pines addressing those matters is filed herewith. It shows the additional fees and costs amount to $6,914.26.

II. ATTORNEY DONOHOO NEVER INVESTIGATED THE LAW AND FAILED TO EVER APPLY THE FACTS TO THE LAW.

Attorney Donohoo claims that before the case was filed he made a factual investigation, he played the recording or showed a transcript of it to four people, including two law clerks employed by him, who said that "they did not believe that anyone listening to the speech could honestly come to the conclusion that the Plaintiff was re-enacting the shooting of gay people." (Donohoo Affidavit, ¶¶ 6 & 7) He "believed" the same thing. (Brief at 6) So, he filed the lawsuit. Of course, Defendants never said Storms was re-enacting anything, so this "investigation" was meaningless.

Furthermore, Attorney Donohoo provides the Court with no information about what investigation he did into the law before he filed the lawsuit. He knew or should

have known that his client was a public figure (he essentially pled that). He knew that Storms, a public figure, had to prove that the statement that he "apparently advocated the murder of gay and lesbian people" was made with actual malice. Fundamental to Donohoo's entire defense to the claim that this action was frivolous is the notion that no one could possibly have interpreted Storms' speech other than did Donohoo, his two law clerks and two other unnamed persons. But nowhere does he explain how he concluded that there was evidence of actual malice. For example, even if no one could reasonably have made Action Wisconsin's interpretation, that interpretation could have been simply a mistake, not borne of actual malice. Donohoo does not even account for the fact that the statement by Action Wisconsin was qualified by the word "apparently." He ignored the fact that Action Wisconsin allowed for the possibility that its interpretation might be erroneous.

Along with the Answer, Attorney Tamara Packard sent Donohoo a letter that explained precisely that point:

> Had you considered the words that your client complains of, you would have recognized that the Defendants did not say that Mr. Storms advocated murder, but rather that he *appeared to the Defendants* to do so. That is an opinion, and a reasonable interpretation of the words he spoke and the context in which he spoke them. You also would have realized that the Defendants did not say that Mr. Storms was shooting at gay people, but rather that the sounds he made, "boom, boom, boom, boom, boom," sounded like gunfire, and that it appeared to them that Mr. Storms was making that noise *as if* he were shooting gay people. That too is an opinion, based on a reasonable interpretation of Mr. Storms' words and the context in which he spoke them. Neither of the statements your client complains of are provably false, and therefore there can be no claim here.

Packard letter to Donohoo, April 22, 2004, p. 2. (Exhibit 2 to 08/11/05 Pines Affidavit) Then Attorney Packard warned Donohoo that he had no evidence of actual malice:

> In order for a public figure to succeed in a defamation claim, he must also prove actual malice. You have no evidence, nor is there any, that the statements your client complains of were made with actual malice. In fact, there is no evidence from which you can even argue actual malice. Furthermore, even a cursory review of common law and Constitutional conditional privileges would have shown you that under the facts of this case, the statements your client seemingly takes offense to are privileged.
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> * * *
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> Finally, in the Complaint your client and you allege that the Defendants' statements were motivated by ill-will, bad intent, hatred and revenge. There is absolutely no evidence of such motivation, and indeed the Defendants had no such motivation.

Packard letter to Donohoo, April 22, 2004 pp. 2-3. (Exhibit 2 to 08/11/05 Pines Affidavit) Thus, Donohoo was on notice as soon as the Defendants answered the Complaint that, even if the Defendants were wrong in their interpretation of the Plaintiff's statements, there were no facts that could support an assertion that Action Wisconsin made their statements with actual malice. There is nothing in Donohoo's submission to the Court to show that he ever did any analysis of how he could factually (or legally) prove that there was actual malice in the statements Action Wisconsin made about his public figure Plaintiff.

Moreover, after the Plaintiff's deposition, Donohoo received a detailed letter outlining precisely why the Plaintiff's statements did apparently advocate the murder of gay and lesbian people:

> During Mr. Storms' speech at the International Conference on Homo-Fascism, he said about the gay and lesbian movement and those who are part of it such things as, "They want to kill you," "They have contempt for the things of God . . . . They are a scornful people," "They have to eliminate us and the word of God if they want to succeed. . . . Either it's going to be a homosexual, anti-God nation, or its going to be a nation that stands for God and says that thing is sin. . . . Either they'll crush us and . . . silence us and kill the ones that won't be silent or imprison the ones that won't be silent . . ." Next he identified the gay and lesbian movement as a Philistine army, and said "they want to eliminate us." He said "enough is enough my good friends; let's start taking it to the streets." And then he told the story of how Jonathan and his armorbearer took it to the streets against the original Philistines, but "modernized" the story (pp. 101-102), no doubt

> to remind his listeners of those he identified as the modern Philistine army–the gay and lesbian movement. In Mr. Storms' telling of the story, a modern Jonathan shot 20 Philistines, then suggested a celebratory meal at McDonalds before returning to kill off the rest. Mr. Storms admitted that the battle Jonathan started with the Philistines was to the death: it was not a situation where the Israelites went to the Philistines and said "join us - - be our friends." The object was to kill them so they would no longer be in the land of Canaan. (p. 100)

Pines' letter to Donohoo, July 19, 2005, page 2. (Exhibit 3 to 08/11/05 Pines Affidavit) So, as of July 19, 2004, Attorney Donohoo had been told in great detail precisely how someone could reasonably interpret Storms' statement as did Action Wisconsin.

Knowing that, Donohoo was obligated to look again at the law and determine whether he had a viable lawsuit. There is nothing in his submission to suggest that he did so. Instead, he did the following: he persisted in asserting that: (1) no one could possibly have interpreted the Plaintiff's statement as did Action Wisconsin, calling its interpretation "a breath taking stretch" (see Donohoo letter to Pines, July 22, 2005, p. 2; Exhibit 4 to 08/11/05 Pines Affidavit); and (2) because no one could make such an interpretation, Action Wisconsin must have been acting with actual malice, that is, acting from ill-will, bad intent, hatred or revenge.[1] He asserted that, without any basis, at every turn: in response to the summary judgment motion, in his own summary judgment motion, in his motion for reconsideration and in his response to the motion for attorneys fees. Attorney Donohoo's behavior is nothing if not consistent: he has consistently ignored the law and consistently ignored the facts.

[1] Indeed, he now audaciously asserts that based only on the "investigation" he conducted prior to filing the lawsuit, he had all the evidence he needed to win! (Brief at 9)

Attorney Donohoo's blind insistence that his view of the facts was the only possible view that anyone could have held is expressed in his Brief in Opposition to Defendants' Motion for Costs and Fees, where he discusses the Court's analysis of the Plaintiff's speech:

> The Court in its Decision states in essence that the only interpretation a listener could come to after hearing the Plaintiff's speech was that the Plaintiff was re-enacting the shooting of gay people, and additionally that the Plaintiff was advocating the murder of gay people in his speech. The Court declared that any other interpretation of the speech "would be strained and inconsistent with the speech as a whole." (Decision, Pages 11-12) . . .This conclusion of the Court was illogical, and **it is inconceivable that anyone would come to that conclusion after listening to Pastor Storms' speech . . .**

Plaintiff's Brief, page 4 (emphasis added).

Essentially, Attorney Donohoo is arguing a variant of the failed "empty head, pure heart" defense to a claim of frivolousness.[2] *Riley v. Isaacson*, 156 Wis. 2d 249, 259, 456 N.W.2d 619 (Ct. App. 1990). ("An empty head but pure heart is no defense.") His defense might well be called "all-of-you-have-empty-heads" arguing that: *it is inconceivable that I could have filed and maintained a frivolous lawsuit because everything I alleged is true and correct despite the fact that the Court found that I had produced no facts to support the claim and provided no law to support it either.*

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[2] Donohoo also continues in his habit of misquoting and misrepresentation. The Court never said that Action Wisconsin's interpretation of Storms' speech was "the only interpretation a listener could come to," as Donohoo claims in the above quote, as well as elsewhere in his brief (p. 5) nor did the Court or Action Wisconsin ever say that Storms was "re-enacting the shooting of gay people." The Court did say that Action Wisconsin's interpretation was "not unreasonable" and that Plaintiff's interpretation is (not "any other interpretation would be," Plaintiff's Brief p. 4) strained and inconsistent with the speech as a whole."

In this State, attorneys are supposed to be objective in their analysis of the facts and the law. They are officers of the court. They are supposed to make "a reasonable and thoughtful inquiry into a claim before filing any document with the court. " *Belich v. Szymaszek*, 224 Wis. 2d 419, 433, 592 N.W.2d 254 (Ct. App. 1999). It is neither reasonable nor thoughtful for an attorney representing a party in a lawsuit to adopt a fixed, rigid, and unswerving factual and legal position to which he adheres despite all the evidence and law to the contrary. To do so is to engage in frivolous litigation. That is what Attorney Donohoo did and continues to do. And that is why he must be sanctioned.

III. CONCLUSION.

Defendants' Motion for Costs and Fees should be granted.

Respectfully submitted this _____day of October, 2005,

CULLEN WESTON PINES & BACH LLP

By: _____

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